(2)

No. 03-571

Supreme Court, U.S.
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In The

Supreme Court of the United States

SOUTH COAST CAB CO., INC.,
a California Corporation, et al.,

Petitioners,

vs.

CITY OF ANAHEIM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether certiorari is appropriate to secure uniformity of decision between the federal and state courts to preserve Petitioners' Sherman Antitrust Act claim.

(2) Whether the City of Anaheim's status as a charter city exempts it, in the implementation of a local taxicab franchise ordinance, from Sherman Antitrust Act liability.

(3) Whether Petitioners may challenge the City of Anaheim's taxicab franchise ordinance on a constitutional basis even though Petitioners did not apply for a taxicab franchise.

(4) Whether evidence of alleged antitrust activity on the part of the City of Anaheim is relevant to the analysis of futility as an excuse for Petitioner's failure to exhaust its administrative remedies.

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SUMMARY OF ARGUMENT

The petition in this unremarkable state court appeal is by the unsuccessful plaintiffs challenging an order denying a preliminary injunction. In an unpublished opinion, the state Court of Appeal concluded that the state trial court did not abuse its discretion in denying the motion for preliminary injunction. The petition contends review is necessary because it is unclear what procedures must be followed in the award of franchises in the taxicab industry.

The petition should be denied for two main reasons: (1) it neither asserts an important federal question nor presents a necessity to secure uniformity of decision; and (2) it is unsupported by the facts and law.

Respondent City of Anaheim (City) files this Brief in Opposition only because the Petition contains factual and/or legal misstatements the City wishes to bring to the Court's attention. Nothing in the petition warrants a review by this Court.

On March 21, 2002, the trial court denied South Coast Cab's (SCC) motion for preliminary injunction holding: "The court will not invoke its equitable powers to dismantle the franchise system at the behest of a party who never even sought issuance of a franchise to it." (CT 778). SCC never applied for a taxicab franchise.

The Court of Appeal's opinion accurately recites the trial judge's findings and correctly applies the substantial evidence rule. The petition should be denied.

The City is still puzzled as to why there was no franchise application by SCC. There was no down side to SCC putting in a franchise application. If SCC's application

was denied, then it could have properly filed a writ of mandate action.

What SCC's owners subjectively believed is not relevant. Since SCC was so sure any application would be denied, it would not have had to do anything within two months under the City's Request for Proposal (RFP), except get the ten thousand dollars ($10,000) deposit back. There is nothing in the lengthy administrative record to indicate that the RFP requirements (newer cabs, etc.) had to be in place before SCC could even apply. SCC could have filed an application and simply stated it will comply with the requirements if it gets a franchise, but SCC did nothing.

SCC must first exhaust its administrative remedies. There is no rule that one must exhaust administrative remedies unless you have a subjective belief you will not win. That is what SCC is arguing because it continues to argue Petitioners believed this and Petitioners believed that. But Petitioners subjective beliefs are not relevant to the question of whether SCC exhausted its state administrative remedies.

The RFP requirements were straight forward. The administrative remedy here was to apply for a taxicab franchise. This case should not be decided on the subjective state of mind of SCC's owners.

SCC argues that the City was never going to give it a franchise, so it just filed its mandamus action in state superior court. Petitioners should not get very far with that writ action and in fact a judgment was entered for the City.

Petitioners argue *Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 112 Cal.Rptr. 761 (1974) supports their position that, if Petitioners knew SCC was not going to get a franchise, this excuses SCC not exhausting its state administrative remedies. However, the futility exception to exhaustion does not apply unless the petitioner *can positively state* that the administrative body has declared *what its ruling will be in a particular case. Sea & Sage Audubon Society, Inc. v. Planning Com.*, 34 Cal.3d 412, 418, 194 Cal.Rptr. 357 (1983). On the merits, substantive evidence supports the City's decision to move from a permit system to a taxicab franchise system.

STATEMENT OF THE CASE

1) City's Motion for Summary Adjudication

On April 2, 2002, the trial court granted summary adjudication (CT 792-797) stating in part:

> ". . . Plaintiffs claim for damages in their fourth cause of action for violation of the Sherman Anti-Trust Act has no merit because the Local Government Antitrust Act 'established as a general rule that **antitrust damages are not recoverable from any local government**.' *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265, 1266 (6th Cir. 1989). (Emphasis added); *California Governmental Tort Liability Practice*, 4th Ed., (2001), §9.77, pgs. 496-497."
>
> "FURTHER, Plaintiffs' third cause of action for violation of the Cartwright Act has no merit because the California Supreme Court held '[t]he actions of political subdivisions of the state, such as the City . . ., and the effects of such actions

are outside the scope of the [Cartwright] [A]ct.' *Blank v. Kirwan*, 39 Cal.3d 311, 323, 216 Cal. Rptr. 718, 725 (1985). Thus, municipalities cannot be sued as *defendants* under the Cartwright Act."

2) SCC's Motion for Preliminary Injunction

On March 21, 2002, the trial court ruled:

"The plaintiff moves this court to enjoin implementation of the recently-enacted taxicab franchise system. The application is denied for two reasons: 1) Plaintiff seeks to prevent franchises from operating under the ordinance because plaintiff contends the means by which the franchises were awarded, and/or the reason for the enaction of the ordinance, was in some manner biased against it. Ironically, however, as all agree, plaintiff never applied for a franchise. The court will not invoke its equitable powers to dismantle the franchise system at the behest of a party who never even sought issuance of a franchise to it. 2) The injunction would affect the important and substantial rights of entities not parties to this action."

(CT 778).

3) City's Motion for Judgment on the Pleadings

Attached as Exhibit C to SCC's opposition to the City's motion is the federal court order staying the federal case, entered on November 29, 2001 (CT 751) which states in part:

"Taxicab regulation is a matter best-suited to local regulation. The resolution of the state law

> issues is uncertain. The California Superior Court's decision could eliminate the need for resolution of the issues presented here. Also, this action presents the same facts and issues pending before the state court. A stay pending the ruling of the California Superior Court will preserve judicial economy. Defendant's Motion for a Stay is GRANTED."

On March 28, 2002, the trial court's order granting judgment on the pleadings (CT 780-782) stated:

> "State courts do not have jurisdiction to consider any claim under the Sherman Act or federal antitrust law. Federal courts have exclusive jurisdiction over all Sherman Act claims, and state courts are precluded from considering such claims. *United States Golf Association v. Arroyo Software Corporation*, 69 Cal.4th 607, 623-624, 81 Cal.Rptr.2d 708, 717-718 (1999)."

"IT IS THEREFORE ORDERED that the said motion for judgment on the pleadings is GRANTED and the fourth cause of action being only the only remaining cause of action the case is dismissed."

On April 17, 2003, the motion to consolidate state court appeals nos. G030079, G030551 and G031608 for purposes of decision was denied. On the same day, the state Court of Appeal affirmed the denial of SCC's motion for preliminary injunction. On May 19, 2003, SCC's Petition for rehearing was denied by the state court of appeal.

On July 16, 2003, SCC's Petition for review was denied by the California Supreme Court.

STATEMENT OF THE FACTS

On March 21, 2000, the City Council received the report of the *Ad Hoc* Committee and the independent consultant recommending that the current **taxicab permit procedure be replaced by ordinances awarding taxicab franchises** based upon new minimum service standards and recommending a competitive process for the award of the franchises. 2nd AR 144-145.[1] At a City Council meeting held March 21, 2000, John Poole, the City's Code Enforcement Manager, said that after many hours of study his department favored a franchise system because it delivered better service. 2nd AR 142. The City Council approved an agreement not to exceed $77,520.00 with the independent consultant to develop and assist in implementation of a taxicab franchising plan. 2nd AR 141-145. The *Ad Hoc* Committee held public meetings over the spring and summer of 2000. Members of the taxi industry participated and provided comment in the development of the franchising plan. 2nd AR 684. The *Ad Hoc* Committee endorsed the consultant's recommendations on July 11, 2000. 2nd AR 684.

On July 20, 2000, the City's consultant issued his report entitled "Anaheim Taxicab Franchise Development-Recommendations" wherein a franchise process was recommended. 2nd AR 210-260. Three franchises were recommended because: "**Three companies provide** a higher level of competition, more opportunity for fresh ideas and **opportunities for smaller companies** than would franchising of only two companies." 2nd AR 214.

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[1] AR refers to Administrative Record.

The consultant's report stated that the City Council "may" want to consider a separate provision in the RFP giving existing companies an opportunity to continue to operate their current number of taxicabs (115 for Yellow Cab and 50 for A Taxi) provided they meet the franchise requirements, 2nd AR 214, 220, 809. But this provision was not a recommendation, 2nd AR 334. It was NEVER adopted by the City Council, 2nd AR 351-353, and was *not* included in the RFP. 2nd AR 857-870.

On August 8, 2000, the consultant presented his recommendations for a franchising plan to the City Council at a workshop. 2nd AR 202-209. Later that evening the City Council heard public comment on the franchising plan, Savvas Roditis spoke against the franchise, 2nd AR 286-288, and the Council continued the recommendation to August 29, 2000, 2nd AR 264, and denied SCC's latest application for a taxi permit based on a finding of "no public convenience or necessity." 2nd AR 261-266, 317-318. SCC applied for a rehearing and the item was placed on the August 29, 2000 City Council agenda.

On August 29, 2000, the City Council approved the franchising plan and directed staff to circulate RFPs for taxicab franchises which contained the components and criteria as recommended by the consultant. 2nd AR 329, 351-353. The benefit of moving to a franchise system included that it "raised the bar" in terms of service quality using a competitive process. 2nd AR 203.

Later that evening, on August 29, 2000, after SCC's counsel spoke in favor of granting SCC a rehearing on the denial of SCC's permit application, Councilman Feldhaus stated: ". . . **Mr. Roditis is welcome to again apply**

under that franchise [system] . . ." 2nd AR 357:21-358:28.

SCC's request for rehearing was denied. 2nd AR 359.

On September 20, 2000, the City sent out the RFP (2nd AR 857-870) for the selection of "up to three taxicab [franchises] who best meet the [RFP] requirements" to operate a total of 230 taxicabs to **replace the permit system**, 2nd AR 858, to which all taxicab companies were invited to apply, including SCC. The RFP clearly set forth that it would be released in September 2000 and that the *ordinances to award the franchises would be adopted later*, tentatively on December 19, 2000. 2nd AR 861. The RFP included procedures (2nd AR 860-863), general franchise requirements (2nd AR 864-866), and evaluation measures. 2nd AR 867-870. One hundred (100) points were possible made up of: 1) prior taxi experience (25 points) (two parts, one part being experience in operating taxicabs, the other experience in Anaheim); 2) financial stability (20 points); 3) quality of service (25 points). 2nd AR 867; 4) anticipated ability to meet and maintain performance standards (25 points). 2nd AR 868; and 5) clean fuel vehicles (5 points). 2nd AR 869.

Start-up provisions of the RFP required that each franchisee shall place 30% of the taxis into service within two months of the start of the franchise and 100% of their taxis into service within six months of start of the franchise. 2nd AR 864. Taxi vehicles could not be more than 7 model years of age [i.e., 1995] and in service as taxicabs for more than 5 years. 2nd AR 864. The RFP required that the response specify the number of taxicabs that the company proposed to purchase if it was awarded a franchise. 2nd AR 869.

Responses to the RFP were initially due on October 20, 2001, 2nd AR 858, and on October 17, 2000, the deadline was extended to October 30, 2000. 2nd AR 414-415. By the time of the October 30, 2000 deadline, the City received five responses: A Taxi Cab; American Taxi; Cabco Yellow dba California Yellow Cab; AM-PM Taxi; and Yellow Cab of North Orange County. SCC did NOT submit a proposal, even though no one knew, at that time, how the state Court of Appeal would rule on SCC's appeal in G026197.

When Savvas Roditis spoke against the taxi franchise on August 8, 2000, he stated: "I'm here tonight to speak about the franchise system. . ."

"My suggestion is ... I'm against that franchise system because you eliminate ... the smaller cab companies, to make a bid, to meet the requirements and get a [franchise] with the City of Anaheim ... ."

"So the franchise system is for the bigger companies ... ."

"So, I think we should stop it right here, the franchise system, and stay the way ... it is ... because we don't want to spend anymore money on the situation, and it's not gonna work."

"It's gonna work for these companies, ... they have the LPG or natural gas, or ... a computerized [dispatch] system. Most of the cab companies, right now, they have ... two-way radios, like, A Taxi, South Coast Cab, Orange County Yellow Cab, California Yellow Cab, and to put all the system ... you need at least three hundred thousand dollars ($300,000) to meet these requirements, and my

suggestion is, everything came up on those things just for me."

"Because I applied eight times for [a permit], and they know I have **to spend . . . three hundred thousand dollars ($300,000) to meet these requirements.**"

"So, please g[ive] this consideration and . . . stop it right now." 2nd AR 286:15-288:7.

Thus, SCC did not apply for a franchise because it did not want to commit to spending $300,000 if the City Council granted it a franchise. It did not want to "raise the bar."

When asked why SCC was not going to put in for a franchise, Mrs. Roditis testified at her deposition that: "You know who is going to get [the franchise]. American [Taxi] is going to get it. Why should I go through the expense?" (CT 589). "Why [SCC] going to []offer up for the franchise when they're going to give it to American [Taxi]." (CT 589). "[Y]ou have a cab company, it has the airport [franchise], it has CNG brand-new cars, is applying for the [franchise] in Anaheim, and they're not going to give it to them." (CT 589). "Q: So, was it your belief at that time, ma'am, and this was in September of 2000, that South Coast Cab couldn't compete with American Taxi for one of the franchises?" "A: Of Course." (CT 589). "Q: Because they had a bigger, newer fleet, [and] had the airport franchise?" "A: Yes." (CT 589).

Later, Mrs. Roditis testified that: "I know what it needs to run a cab company. And you see a cab company [American Taxi] popping out of the blue with brand-new vehicles and everything financed. Yeah, if you don't manage your finances and everything, you're going to go under.

I knew [American Taxi was] going to go under . . . . If you have a brand-new company popping out of the blue because they got the airport, it doesn't mean anything." Deposition, Page 107:14-108:4.

Franchises were eventually awarded to Yellow Cab, A Taxi and California Yellow.

ARGUMENT

I. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW

Certiorari should be denied for the simple reason that this case presents neither an important question of federal law nor a necessity to secure uniformity of decision. The state Court of Appeal did not decide an important question of federal law in a way that conflicts with relevant decisions of this Court.

II. NO IMPORTANT QUESTION OF FEDERAL LAW

SCC contends certiorari is necessary because it is unclear what procedures must be followed in the award of franchises in the taxicab industry.

The Court of Appeal was correct in holding that:

"*O'Connor v. Superior Court*, 90 Cal.App.3d 107, 153 Cal.Rptr. 306 (1979) [city could compel existing taxicab permits holders to surrender old, transferable permits for new, nontransferable ones] is on point. If a city has the right to change from a transferable permit system as in *O'Connor* – that is, from a system where the permits have

an artificially created market value – to a system of nontransferable permits (thereby depriving the permit holder of a real tangible economic interest), it has the right, as here, to change from a nontransferable permit system to a franchise system." App. 11. The City's change from a permit system to a franchise system is not important question of federal law under U.S. Supreme Court Rule 10(c) that needs to be settled by this Court.

III. PETITION IS UNSUPPORTED BY FACTS AND LAW

Appellate courts reviewing the superior court's decision *always* apply a *substantial evidence* standard. *Fukuda v. City of Angels*, 20 Cal.4th 805, 824, 85 Cal.Rptr.2d 696, 708 (1999).

Where the superior court applied the *substantial evidence* test (no vested fundamental right involved), the appellate court's function is identical to that of the superior court: It will review the *administrative record* to determine whether the agency's findings were supported by substantial evidence, rather than limiting review to the trial court's findings. *Ryan v. California Interscholastic Federation-San Diego Section*, 91 Cal.App.4th 1048, 1077, 114 Cal.Rptr.2d 798, 821 (2001).

On a substantial evidence review the appellate court's opinion will state the facts in a manner that resolves all conflicts and *draws all inferences in favor of the prevailing party*. *Kotler v. Alma Lodge*, 63 Cal.App.4th 1381, 1383, 74 Cal.Rptr.2d 721, 723, fn. 1 (1998).

The opinion may describe evidentiary conflicts but is not required to do so. And it is not uncommon for a court to

ignore them and simply state the facts in the light most favorable to the prevailing party, particularly where the substantial evidence issue is the only one requiring an evaluation of the evidence. Such a factual statement is *not* a basis for certiorari.

The Court of Appeals's opinion need not address every point raised by the parties. The written opinion need only state the *essential facts* and briefly discuss the *essential legal issues*. *Lewis v. Sup.Ct. (Green)*, 19 Cal.4th 1232, 1263-1264, 82 Cal.Rptr.2d 85, 107-108 (1999).

The Court of Appeal concluded that: "If South Coast Cab were prepared to compete for a franchise, and simply wanted a level playing field, presumably it would have requested relief in the trial court seeking a mere modification of the evaluation criteria for the franchise system, not its wholesale overthrow. The fact that it didn't make such a request confirms what can be reasonably inferred from Savvas Roditis $300,000 remark: South Coast Cab didn't want to be part of any franchise system, and had pinned its entire hopes on being exempt from one." Opinion, page 13.

SCC has claimed this is a factual misstatement. Yet SCC could have sought this relief at the time it sought its preliminary injunction.

SCC also attacks the Court of Appeal's finding that: "The second allegation of favoritism concerns Cabco, which supposedly didn't immediately meet all the terms of its bid when it started operating. That point is refuted because the franchise ordinance itself gave each successful applicant two months to comply." Opinion, page 11, fn. 7.

Start-up provisions of the RFP required that each franchisee shall place 30% of the newer taxicabs into service within two months of the start of the franchise and 100% of their taxis into service within six months of start of the franchise. 2nd AR 864. Obviously, this included the computer in the taxicab itself. The RFP was incorporated into each franchisee's ordinance. AR2 3565-3579.

The Court of Appeal also stated: "Specifically, at a city council meeting in August 2000, Savvas Roditis indicated that he did not want to spend $300,000 to 'meet these requirements.' He was obviously referring to what South Coast Cab would be required to spend *if it first received a franchise."* Opinion, page 11.

SCC claims that the above factual recital has no basis in any testimony given by Savvas Roditis.

SCC overlooks the fact that Savvas Roditis spoke before the City Council on August 8, 2000, and stated: ". . . I'm against that franchise system . . . I think we should stop it right here, the franchise system, and stay the way . . . it is . . . because **we don't want to spend** anymore money on the situation . . . you need at least three hundred thousand dollars **($300,000) to meet these requirements** . . . I have to spend . . . three hundred thousand dollars ($300,000) to meet these requirements. So . . . stop it right now." 2nd AR 286:15-288:7 (emphasis added).

Thus, it is clear that SCC did not apply for a franchise because it did not want to commit to spending $300,000 if the City Council granted it a franchise. Further, the Court draws all inferences in favor of the prevailing party. *Kotler v. Alma Lodge*, 63 Cal.App.4th 1381, 1383, 74 Cal.Rptr.2d 721, 723, fn. 1 (1998).

If, as SCC's owners subjectively believed, the City was going to deny it a franchise, then SCC would not have to spend $300,000 or do anything else other than apply. SCC would only have to spend $300,000 if it was granted a franchise. There is nothing in the AR to support SCC's interpretation of the City's RFP. The RFP is clear that nothing had to be in place just to apply for a franchise.

The Court of Appeal correctly "confirm[ed] what can be reasonably inferred from Savvas Roditis $300,000 remark: South Coast Cab didn't want to be part of *any* franchise system, and had pinned its entire hopes on being exempt from one." Opinion, page 13.

SCC clearly misinterpreted the terms of the RFP as requiring immediate compliance. Petition, page 8.

Thus, the Court of Appeal was correct in: "conclud[ing] that the likelihood of success on the merits was so low – essentially the likelihood is nil . . . ." Opinion, page 6.

Lastly, the Court of Appeal in a separate proceeding, Case No. G030079, addressed the Sherman Anti-Trust Act issues. Opinion, page 8, fn. 3. In Case No. G030079, page 4, the Court of Appeal held:

> "It is safe to say that municipalities and their employees – at least insofar as those employees act within their 'official capacities' – are immune from damage claims under antitrust laws. The federal law explicitly says so. (15 U.S.C. §35(a)) ['No damages, interest on damages, costs, or attorney's fees may be recovered under [federal antitrust law] from any local government, or official or employee thereof acting in an official capacity.']) State law implicitly does. (See *People ex. rel. Freitas v. City and County of San Francisco*,

> 92 Cal.App.3d 913, 925-926, 155 Cal.Rptr. 319 (1979) [noting that it would be "illogical and unreasonable" not to include individual members of board of supervisors within scope of state antitrust immunity afforded cities].)"

The Court of Appeal held that two City employees were acting in an official capacity and the judgment dismissing them from the case was affirmed.

Given that the Court of Appeal's opinions, granting SCC's petition is hardly appropriate. The Court of Appeal's ruling is a rather mundane application of state law. Simply stated, nothing warrants granting the petition in this case.

CONCLUSION

The petition should be denied. However, SCC is not without a remedy. It is appealing the state court judgment in favor of the City (entered after the denial of SCC's motion for preliminary injunction) in Case No. G031608 and is also appealing to the Ninth Circuit the denial of its motion to reopen the federal case in Case No. SACV99-416GLT(ANx).

DATED: November 17, 2003

Respectfully submitted,

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